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Issue Date: 26 January 2007

CASE NO. 2005-LHC-01178

OWCP NO. 14-135738

In the Matter of:

W. M.,
Claimant,

vs.

FRED WAHL MARINE CONSTRUCTION,
Permissibly Self-Insured Employer.

DECISION AND ORDER

Appearances: Charles Rabinowitz, Esq.
For the Claimant

Dennis VavRosky, Esq.
For the Employer and Carrier

Before: WILLIAM DORSEY
Administrative Law Judge

The Claimant injured his back while working for Fred Wahl Marine Construction ("the Employer") as a laborer. He claimed compensation under the Longshore and Harbor Workers' Compensation Act ("the Act"), 33 U.S.C.A. § 901 *et seq* (West 2006), and received disability payments.

The Employer accepted liability for the back injury. It disputes the extent of the disability, asserting the Claimant is capable of performing suitable alternative employment if he diligently sought it. The Claimant contends that he lacks the physical capacity to perform the jobs the Employer has identified and that suitable jobs simply are unattainable in the tight job market around his rural hometown of Reedsport, Oregon.

Procedural Background

On June 5, 2001, the Employer began paying temporary total disability benefits at a weekly rate of $113.13.[1] When the Employer discontinued those voluntary payments on January 17, 2003, the Claimant requested a hearing. Judge Torkington issued an Order of Remand that reinstated the Employer's obligation to pay those benefits. On May 5, 2005, the Employer moved for modification pursuant to Section 22 of the Act, to terminate the benefits on the grounds that the Claimant was no longer disabled. Judge Turek denied the motion for modification on August 8, 2005.

On November 29, 2005, I held the first of two formal hearings in Portland, Oregon where the Claimant testified. His wife ("E.M."), and his brother-in-law ("S.G.") also testified for him, but expert testimony was deferred because the medical evidence about the Claimant's physical limitations had to be clarified. After the treating physician was deposed, the second hearing convened on May 4, 2006, during which the parties presented expert testimony, evidence, and arguments on the question of suitable alternative employment. Two vocational rehabilitation experts testified: Mr. Dennis Funk, for the Employer and Mr. Scott Stipe for the Claimant. The following exhibits were admitted into evidence: Claimant's Exhibits ("CX") 1-51, 53-63;[2] and Employer's Exhibits ("EX") 1-72, 74-77.

Given the Claimant's specific limitations as the treating physician articulated them at his deposition, I find that the Employer identified one suitable job that the Claimant can perform. Although the Claimant has neither pursued employment opportunities diligently, nor attempted to improve his employability, this single job is not enough for the Employer to carry its burden of proof. There must be a range of jobs the Claimant can perform, and can reasonably obtain. Consequently, I find that the Claimant is permanently and totally disabled as of January 27, 2003.

STIPULATIONS

The parties stipulate and I find:

1. The Claimant's injury falls within the Act's coverage (situs and status).

2. At the time of the alleged injury, an employer-employee relationship existed between the Claimant and the Employer.

3. The claim was timely filed and noticed.

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[1] Later, the parties stipulated to an average weekly wage of $227.10.

[2] Employer's exhibit 77 was admitted into evidence by my order dated November 8, 2006. The Claimant submitted exhibit 62 on January 8, 2007, along with a supplemental memorandum regarding these two exhibits. On January 9, 2007, the Claimant submitted exhibit 63. The Employer responded to the Claimant's supplemental memorandum, but did not lodge any objections to the Claimant's final two exhibits, so they are admitted.

4. The Claimant sustained an injury to his back that arose out of and in the course of employment.

5. The Claimant's average weekly wage was $227.10.

ISSUES

1. Whether the Employer identified suitable alternative employment that is reasonably available to the Claimant, if he made a diligent job search.

2. Whether the Claimant's attorney's may recover fees and costs.

FINDINGS OF FACT

Background

The Claimant is a 46-year-old man who went to work for his father's well-drilling business after he completed the eleventh grade. Hearing Transcript ("TR") at 69-70.[3] In 1987, he fell twenty feet and suffered an L3-4 vertebral rupture that required surgery, but he had a full recovery. EX 5. He remained with the family business for twenty-two years, but left after his grandfather died on a drilling rig. TR at 70, 74. He held jobs thereafter as a laborer, a truck driver, and as a diesel mechanic. TR at 71.

The Claimant resides in the town of Reedsport in Douglas County, on the southern coast of Oregon. With its costal location, Reedsport has a seasonal, tourist-based economy that diminishes during the fall and winter and surges during the spring and especially the summer. The Employer offered him a job in its boat-building business only after he repeatedly applied there for work over a period of two years. TR at 74. He suffered the back injury at issue after working there for three months.

Summary of Medical Evidence

On May 15, 2001, the Claimant felt his back pop as he carried a heavy piece of steel to a rack. TR at 73. The next day, Janet E. Patin, M.D., diagnosed low-back strain with radiculopathy. CX 5. Dr. Patin referred the Claimant to William J. Bernstein, Ph.D., M.D., a neurologist, who evaluated him on June 7, 2001. CX 8. The Claimant's walking was "grossly antalgic and somewhat theatrical," and many inconsistencies on the clinical examination raised the issue of exaggeration, yet Dr. Bernstein diagnosed a pain syndrome. *Id*. Despite treatment for pain, the Claimant did not improve. CX 9, 10.

On August 20, 2001, Jeffrey K. Bert, M.D., an orthopedic surgeon, examined the Claimant and determined that he suffered from a recurrent disk herniation. CX 13. He ordered

[3] There are two sets of transcripts. The hearing on November 29, 2005 is abbreviated as "TR." The hearing on May 4, 2006 is "TR2."

physical therapy and referred him to Michael Pylman, M.D., a pain specialist. CX 15, 19. Dr. Bert later recommended surgery when the Claimant failed to recover. CX 25.

On July 11, 2002, the Claimant had a laminectomy and diskectomy at the L5-S1 level, partial laminectomy and exploration at the L4-L5 level, bilateral forminotomies at L4-5, and L5-S1, and pedicle screw fixation. CX 26. He testified that he seemed to be better for the first three to four months, but then he "just started deteriorating." TR at 77. The Claimant returned to Dr. Bert's office on October 28, 2002, where he was examined by Mark A. Wells, the physician's assistant. CX 29. Mr. Wells discussed options for the Claimant to return to work, which the Claimant "stated he would like to do." *Id.* Mr. Wells recorded in the clinical notes that when he raised the issue of physical therapy to help him return to work more quickly, the Claimant "stated that he does not feel this would be appropriate; he does not want to do physical therapy, he just wants his prescription and to remain off work." *Id.*

On November 27, 2002, Dr. Bert recommended vocational rehabilitation and that the Claimant be taken off of his pain medication. CX 30. On January 27, 2003, he opined that the Claimant had reached maximum medical improvement ("MMI") and released him for light to light-moderate work. CX 31. He later reported that the Claimant was able to bend, squat, crawl, twist, reach above his shoulders, use stairs, ladders, and walk on uneven surfaces occasionally, and that he could lift up to 20 pounds occasionally. EX 55 at 98.

In response to the Claimant's continuing complaints of pain, Dr. Bert ordered an enhanced MRI on September 29, 2003, with "not very revealing" results. CX 36. The Claimant returned to Dr. Pylman, who performed a nerve root block and prescribed strong pain medication such as methadone and Duragesic patches.[4] CX 42. The Claimant reported that the patches worked fairly well for him. CX 44.

Dr. Bert ordered x-rays on June 8, and a second MRI on June 10, 2005, because of the Claimant's report of weakness when he walked. EX 50. Upon review of the films, Mr. Wells reported the fusion site was "looking very good," and Dr. Bert opined that overall, the post-surgical changes appear stable. EX 50-52. He referred the Claimant again to Dr. Pylman, who recommended a spinal cord stimulator to help control pain. CX 56 at 139.

At the time of the hearing, the Claimant complained of constant low-back pain. He limps, and claimed that he needs a cane to walk outside of his house.[5] TR at 88. He testified that he can stand twenty-five to thirty minutes at a time, and possibly stand or walk up to three-and-a-half to four hours in an eight-hour day. TR at 84-5. He feels he can sit at most for 40 minutes, but then he needs to lie down. *Id.* His wife testified that the Claimant has trouble sleeping through the night, that she has to put on his socks and shoes for him, and that his daily activities are limited to doing puzzles, walking, cleaning dishes once a week, pulling weeds in the yard while sitting in a chair, and watering the flowers. TR 50-52, 56.

[4] Dr. Pylman performed a drug screen that was positive for THC, the psychoactive component of marijuana. CX 40.

[5] Surveillance tapes include coverage of the Claimant showing he sometimes used a cane as he walked outside his house, but did not require it to walk. EX 72 at 273- 83.

Employment Opportunities in Reedsport, Oregon

Testimony of S. G.

S.G., Claimant's brother-in-law, sought steady work in Reedsport for two-and-a-half years before he obtained a job as a sanitation truck driver in Florence, 25 miles outside of Reedsport. TR at 31-35. He asserted he was in contact with the sanitation company for three years before a job opened. TR at 35. In the interim, he applied for a waste-water management position in Lakeside, he was self-employed as a mover, and he checked the newspapers for jobs but found, "there's just not a whole lot in there." TR at 42. When asked about the type of work available at the local gas stations, he testified that he believes the work requires "eight-hour shifts on your feet with no breaks." TR at 36.

Testimony of E.M.

E.M. is Claimant's wife. She testified that the most strenuous thing the Claimant has done since his surgery in 2002 was climbing a two-step stepping stool to patch a leaky window on their motor home. TR at 55. She claimed that afterward he stayed in bed for three or four hours because he had lifted his arms too high. TR at 56. She mentioned that he uses a cane for long walks. TR at 49.

E.M. testified that one of the restaurants identified as suitable employment, the King Neptune's Inn, is a family-owned business that rarely offers jobs to anyone who is not a family member. TR at 63. She has experience working in restaurants, and applied a year-and-a-half before the hearing for a position at Oregon Grinders, another restaurant the job survey identified as a potential employer, but she was not hired. TR 61-67.

Vocational Rehabilitation

Mark McGowan

In October of 2002, the District Director appointed Mark McGowan, a vocational rehabilitation counselor, to assist the Claimant. Mr. McGowan researched Reedsport and the southern Oregon coast area over about nine months. CX 48. Reedsport's population, based on a 2000 census, is between 4,200 and 4,300 people, and the local economy primarily relies upon seasonal tourism. CX 61 at 210.

On June 17, 2003, Mr. McGowan called the Umpqua Training and Employment (UT&E) office in Roseburg, which is the workforce development agency for Douglas County, Oregon. A UT&E representative explained that she had been covering Reedsport for about five years, and it was her experience that finding a job there depended on a kind of "good ol' boy" network. She thought that the job market in Reedsport was "dead." CX 51 at 106.

Mr. McGowan did not expand his search to any additional locale because the Claimant has no driver's license. He lost his driving privilege because he failed to pay speeding and

overload tickets he received while working as a truck driver. He claimed that his trucking employer deducted money from his paychecks to cover the tickets, but then never paid them. The Claimant testified that he must pay between $2,000 and $2,500 in fines to reinstate his license. He reported to Mr. McGowan that he owes $1,688.22, a lower and more precise figure. CX 51 at 104. No record or statement from a public agency showing the payment that is required to reinstate his driver's license was offered in evidence. I accept that the Claimant's license was suspended for non-payment of traffic fines; the Employer/Carrier offered no evidence to suggest that the testimony that his license was suspended due to non-payment of significant traffic fines is false.[6] I find the Claimant's inconsistent evidence about the amount he owes unsatisfactory. I cannot determine the amount required to reinstate his license from the evidence available. If his license were reinstated, the Claimant conceded he could drive about 25 miles, which would give him access to employment opportunities in two larger towns, Coos Bay and Florence. TR at 72.

Mr. McGowan observed that the Claimant had to sit and change positions frequently during his two-and-a-half-hour interview, and the Claimant told him he has to lie down three to four times a day for periods of an hour or two at a time to relieve the pain in his back. CX 48. He principally relied on the Bay Area Hospital functional capacity evaluation, discussed below, to determine the Claimant's physical limitations. CX 61 at 204. Mr. McGowan identified one job as an operator in a water treatment plant, for which the Claimant applied but was rejected because he lacked proper certification. Mr. McGowan reported that the Claimant's significant physical limitations, his inability to drive without a license, the absence of public transportation from Reedsport to Coos Bay, and a limited, "very depressed" job market in Reedsport rendered vocational rehabilitation services unfeasible.[7] CX 51 at 115. With that report, the Department of Labor ended its vocational services to the Claimant.

Functional Capacity Evaluation at Bay Area Hospital in Coos Bay

On March 18th and 19th, 2003, the Claimant had a functional capacity evaluation. The physical therapist at Bay Area Hospital reported that he was unable to lift more than 20 pounds or sit for more than 30 minutes. During this evaluation the Claimant reported that he could sit or stand for 30 minutes, but that he preferred to adopt a variety of postures. This therapist opined that the Claimant gave maximum, consistent effort and that he can return to work within the limits set by Dr. Bert. CX 32.

Dennis Funk

Mr. Funk is a vocational rehabilitation counselor, hired by the insurance carrier to conduct an additional vocational evaluation. TR2 at 18, 20. He submitted labor market surveys

[6] The Employer/Carrier never expressed a willingness to pay the fines to obviate the licensure issue. In mentioning this, I do not imply they have any responsibility to do so.

[7] Mr. McGowan referred the Claimant to Ms. Nancy Blum, another vocational evaluator, for aptitude testing. The results ranked the Claimant at the 8th grade level for reading, 6th grade level for math, and 5th grade level for spelling. CX49.

and proposed jobs he regarded as suitable alternative employment opportunities in local gas stations, restaurants, and a call center within 25 miles of Reedsport. EX 69, 74. He sought jobs outside of Reedsport based on information that led him to conclude that the Claimant could manage his fines and obtain a driver's license by petitioning the traffic court. EX 73 at 287.

Mr. Funk found that some of the gas stations and restaurants in Reedsport were under corporate ownership, and that some employers offer positions where employees are not always on their feet. TR2 33. He testified that when he drove to one gas station, the owner was sitting in a lawn chair waiting for the next customer. TR2 at 35. When he drove to another, he observed that the station attendant could wait for customers in a small booth with a stool. TR2 35. Some restaurants indicated accommodations could be made to allow an employee time to sit, while others allow their employees to sit during breaks and slow periods. TR2 at 37; EX 69.

Mr. Funk identified one large employer, Affiliated Computer Systems ("ACS"), which operates a call center employing approximately 500 people in Coos Bay. He testified that this company has so many openings that it "just needs bodies" to fill the positions; specifically, he found ACS hires new employees on a weekly basis, and testified that there were 50 openings in December of 2005. TR2 45-47.

Progressive Rehabilitation Associates

Progressive Rehabilitation Associates ("PRA") is a team of medical experts who evaluate and treat patients with physical incapacities including chronic pain. TR2 at 21. From August 23, 2004 through September 17, 2004, the Claimant participated in a pain management program there. Ms. Debbie Dodge, an occupational therapist, found that he could lift 15-25 pounds occasionally, but that he demonstrated less than maximum strength effort as she observed no signs of maximum muscular exertion. EX 45 at 73. On September 17, 2004, she projected that the Claimant could sit for an hour at one time, and up to 6 total hours in an 8-hour day with breaks; he could stand and walk 80 minutes at one time, or 7 hours in an 8-hour day.[8] EX 47 at 80. She observed that the Claimant exhibited "pronounced pain behavior," which I understand to be an indication of exaggeration, and that his limitations were primarily "due to subjective complaints of increased low back pain."[9] EX 45 at 72-4. She commented that projections for employability were based on her assessment of the likelihood that he could do more. EX 45 at 73.

E. Ray Tatyrek, Ph.D., the clinical psychologist at PRA, noted that the Claimant used a cane. The Claimant told this psychologist that he uses it "mainly when I'm on long trips or going to be out doing a lot walking." EX 45 at 70. This psychologist found that the Claimant "assumed a rather passive approach to his rehabilitation and recovery and has yet to appreciate the need to develop self-management skills." EX 45 at 71.

[8] Ms. Dodge testified that she projected the Claimant's 8-hour work-day capabilities based on standards determined by a formula, but that she did not know the specifics of this formula. CX 62 at 282.

[9] Ms. Dodge also observed that Claimant sometimes rated his pain at a lower degree than what she figured he was feeling. CX 62 at 277-78.

Upon discharge from this program, Jon Hamby, M.D. opined that the Claimant demonstrated the ability to return to work on a full-time basis in the medium-light category of physical demands. EX 49 at 89. It is not clear how much opportunity Dr. Hamby had to observe and interact with the Claimant. Dr. Bert, however, observed the Claimant over a long course of treatment as his treating surgeon. Therefore, I give Dr. Bert's views about the Claimant's capacities more weight than those of Dr. Hamby.

Scott Stipe

Mr. Stipe is a vocational consultant hired by the Claimant to revisit the job opportunities already identified in and around Reedsport. CX 57. He reiterated that Bay Area Hospital determined that the Claimant gave full, maximum effort during his evaluation, and found the PRA evaluation inconsistent with the physical limitations provided by Dr. Bert. He believed that the Claimant cannot do any of the jobs Mr. Funk identified, and argued that the Claimant is not a candidate for any medium exertional-level work. *Id.* at 143.

Mr. Stipe testified that the state of Oregon employment division listed only 18 job openings per year for all of Douglas County. TR2 at 89. He opined that most of those 18 were likely in the Roseburg area, which is 100 miles from Reedsport.[10] TR2 89. He acknowledged that it was possible for the Claimant to regain a driver's license, but determined that the fines currently restricting his driving privileges amounted to a prohibition. CX 57 at 149.

Mr. Stipe explained that in Oregon, an attendant must pump gas, not the customer. He insisted that the nature of gas station positions Mr. Funk identified changes during Reedsport's tourist season, when an attendant is on his or her feet "virtually all day," making that work much more demanding. TR2 at 87. Although he conceded that the gas station positions typically are classified as light work, Mr. Stipe determined that these jobs in Reedsport are "by definition a medium-level work, semi-skilled occupation," with demands beyond the Claimant's physical limitations. *Id.*

Likewise, he found that fast food restaurants employees need to stand "virtually continuously" and that the employers were not likely able to accommodate an individual who needed to sit for an extended period of time. TR2 at 91-2. He deemed it "extremely important" that 79% of all combined food preparation and food service jobs in Reedsport are available only on a part-time basis. CX 57 at 148. He explained 43% of waiters and 53% of counter attendants were employed part-time. *Id.* Looking beyond food service, he concluded that "[o]verall for all job openings in the Reedsport area, nearly ½ were part-time." *Id.*

Mr. Stipe emphasized that the Claimant has chronic pain, limited education, an introverted personality, and mild to moderate depression that compromises his ability to perform customer service jobs. CX 57 at 149. He agreed with Mr. McGowan that the Claimant is not a candidate for additional vocational rehabilitation and concluded that even if he were to move to a metropolitan area, he may not be capable of performing other unskilled jobs because of his limitations. *Id.* at 150.

[10] Mr. Stipe conceded that 18 is not an entirely accurate number, as not all employers advertise with the employment division. TR2 at 89.

Proposed Employment Opportunities

As of December 10, 2004, the Employer's labor market survey identified the jobs that follow as suitable alternative employment. All but one exceed the Claimant's abilities.

1. Willis Texaco - Gas Station attendant

The employee greets customers, gives directions, pumps gas, and during slow periods cleans bathrooms and refills their supplies. Training includes making change and customer service. Physical demands require lifting less than 10 pounds. Workers are able to sit during slow periods. Full- and part-time work is offered at wages of $7.05 per hour.[11] This employer anticipates one job opening within the year, but last hired in late 2002. EX 69 at 252.

Mr. Funk reported that all of the gas station employers told him that the Claimant's experience as a mechanic makes him an excellent candidate for this work, but he conceded that gas station attendants have to be on their feet for most of the day. EX 73 at 302; TR2 at 79. Dr. Bert approved this gas station job and the one below at Reedsport Chevron. EX 56, 57. The Claimant insists that he cannot do this work because this job entails too much walking and there are few slow periods when he could sit down.

The gas-station manager told Mr. McGowan that walking is required a minimum of 50% of the time and there are some days, especially during the busy summer months, when his attendants "walk all day," which comports with the testimony of S.G. and Mr. Stipe. EX 51 at 112; TR at 36. This manager doubted that someone with the Claimant's limitations could work in a full-service station like this one, where an employee must bend to check a customer's tires. *Id.* He also told Mr. McGowan that over the past few years there has been little turnover, and he did not expect that to change. *Id.* at 113.

Scott Stipe also opined that the Claimant is incapable of this work because it requires "extremely fast movement" to meet customer needs. CX 57 at 143. He explained that it is very common to see station attendants moving at a pace "somewhere between walking and running" in order to maintain customer service. *Id.* at 148. Surveillance tapes show the Claimant walking slowly, often with a pronounced limp. Sometimes he uses a cane, although no physician has described this assistance device as necessary, and no vocational expert excluded any job on the basis that he requires a cane.

Without regard to the Claimant's intermittent cane use, it is undisputed that he cannot be on his feet throughout an eight hour shift. Occasional bending is within the Claimant's capacity, but he would not be able to sit or even stand still if there were a steady stream of customers, something quite likely to be true during the tourist season. He is not a suitable candidate for this service station job based on his physical limitations. This station hires so infrequently that it

[11] The wages reported for all of the identified jobs were based on rates offered when Mr. Funk contacted the employers in November of 2004. EX 69. No evidence was offered that demonstrates what the wages were at the time of the Claimant's injury.

does not represent a job that will actually be available to anyone within a reasonable time frame. It may not be open for a year.

2. Reedsport Chevron and Towing - Gas Station Attendant

Employees check oil, wash windshields, pump gas, and sell propane tanks. They are trained on a computerized cash register and on the pumps. They may lift a 40-pound propane tank once a week. Workers are allowed to sit during slow periods. Full- and part-time work is offered at $7.05 per hour. This employer anticipates two job openings this year, and last hired in May 2004. EX 69 at 253.

The Claimant objects to this job on the same grounds that apply to the Willis Texaco position, and because he cannot lift a propane tank that weighs more than 20 pounds.[12] Mr. Stipe emphasized that checking a customer's oil also could be a problem because the hoods of some old cars weigh more than what the Claimant can lift. TR2 at 88. These lifting requirements are enough to disqualify this job, but it is also inappropriate because the job requires mostly walking – instead of standing and walking interspersed with sitting – especially during the busy summer season. No service station work is suitable.

3. Dairy Queen - Server/Food Preparation

Employees serve customers at the front and drive-through counters; they cook, bus tables, and clean. This employer requires that employees have a positive attitude. Physical demands are standing and walking, and employees rotate to all positions. They can sit during slow periods and when working the drive-through. Full- and part-time work is offered at $7.05 per hour. This employer reported that it hired in September 2004. EX 69 at 254.

Messrs. Funk and Stipe agree that fast food workers are on their feet for most of the day. TR2 at 80; CX 57 at 147-48. If the Claimant is allowed to stand and walk, however, then he is able to do this. Dr. Bert approved this position and all of the restaurant positions below, and clarified that the Claimant could stand and walk combined up to six hours in an eight hour work day. At this job, the Claimant would stand and walk at the front counters, as a cook, and during bussing duties and clean-up, but he can sit while working the drive-through, and during all of his breaks. Mr. Stipe nonetheless reasoned that this position is inappropriate because the pace can be hectic at a fast food restaurant. Unlike the gas station job, there is no indication that the Claimant would have to move through this restaurant at a fast pace fairly characterized as somewhere between walking and running. Therefore, I find that this job is within the Claimant's physical limitations, and it is suitable based on his technical and verbal skills.

Although the Claimant has never worked in the food industry, this is entry-level work. No prior food service experience is necessary. The employer's minimum qualifications are English language skills and a positive attitude toward customer service. The Claimant developed customer service skills while running his father's well-drilling business. TR2 at 42. His complaints of chronic pain, mild depression, and his introverted personality – which may not be

[12] *See* fn 15 *infra*.

best suited for customer service work – are outweighed by evidence that whatever pain behavior and negativity he expresses is motivated, at least in part, by an intention to remain unemployed.

The most significant barrier to this position is whether it is reasonably available. E.M. testified that she never saw a "help wanted" sign at the Dairy Queen, but her observation has little bearing on whether this job would be attainable given on a diligent search. Many employers advertise by word-of-mouth, a method not exclusive to a "good ol' boy" type of network. Mr. Funk's labor survey provides that this particular employer offers 6 full-time and 12 part-time positions, and that it hired two months before he conducted his survey. On balance, I find that this position was reasonably available if diligently sought.

4. King Neptune Drive In – Fast Food Worker

Employees greet customers, make change as a cashier and counterperson, and may prepare orders and do clean-up. Lifting requirements are less than 10 pounds, and those unable to vacuum could be accommodated with a different task. Employees may sit during slow periods. This is a small, family-owned business, in which the employer last hired during the summer of 2004. Full- and part-time work is offered at $7.05 per hour. EX 69 at 255.

The responsibilities for this job are the same as for Dairy Queen, with two notable exceptions. First, employees cannot sit except during slow periods. It is nearly impossible to determine how often business would be slow to ensure that the Claimant's need to change positions from standing and walking to sitting could be accommodated. Even where he could sit during his usual breaks in the morning, lunch, and afternoon, this down-time amounts to less than 2 hours – leaving more than 6 hours that he must stand and walk. Second, this is a small, family-owned business that last hired in the summertime. This suggests that positions are available only on a seasonal basis. This is not enough to establish the Claimant's wage-earning capacity. Therefore, this job is not suitable for him.

5. McDonalds - Crew Person

Employees rotate among counter, food preparation, cooking, and cleaning positions. They must take orders and fill portions. All shifts require employees to stand and walk. Breaks are allowed, and employees may sit during breaks or when business is slow. All shifts are part-time, except for management. Wages are $7.05 per hour, and this employer hired one-and-a-half weeks before the survey was taken in November 2004. EX 69 at 256.

The Claimant is not a suitable candidate for a full-time position at McDonalds because he has no prior experience in food service that would qualify him to begin in a management position. The lifting requirements are unclear even for part-time work. Mr. Funk reported that the heaviest lifting is between 7 to 8 pounds, but Mr. McGowan reported that employees must occasionally lift 30 to 35 pounds. *Id.*; CX 51 at 111. Regardless of what the lifting requirements are, this job presents the same problem as with the King Neptune's Inn position where the Claimant may have to stand and walk for more than 6 hours. Further, the position is not suitable because it is not reasonably available year round. Mr. McGowan discovered that only a "skeleton crew" is employed during the slow winter months. CX 51 at 111.

6. Bedrock Pizza/Chowder House - Food Preparation & Server

This employer is essentially two restaurants in one building. Employees either make pizza, salad, and prepare chicken, or wait on and bus tables. They must be proficient in English and able to make correct change. The employee who delivers the pizza also cleans floors and bathrooms when not busy. A good driving record is required of the delivery driver. Employees are required to have a food handler's card, and an OLCC server's card. New employees are given a temporary food handler's card, but must take a class to obtain a permanent card, which costs $10.00. An OLCC server's card must be obtained by completing a class that costs $50.00, but the employer pays $25.00 of the cost of that class.[13] Lifting requirements are five to seven pounds, and workers are allowed to sit during slow periods. This employer anticipates hiring 10-15 employees, and hired 3-4 months before the survey. This employer offers full- and part-time work at $11.00 per hour. EX 69 at 257.

According to Mr. Stipe, the problem with the server position is that it is a semi-skilled job, where one usually starts as a busser, dishwasher, kitchen helper or doing food prep. CX 57 at 148. He reasons that the Claimant would not be hired because he has no experience with these entry-level positions. While this may be true in some establishments, there is no evidence that all restaurants abide by this hierarchy, or that this employer demands prior restaurant experience; the minimum qualifications are reading and writing English, making change, and obtaining the food handler's and OLCC card.

The Claimant is not qualified to deliver the pizzas because he lacks the necessary license. The food prep/server position too, is outside of his physical limitations because waiting tables gives little opportunity for the employee to sit or stand still. The hectic pace of this job is different from that of a fast-food counter position where one could lean on the counter for support when necessary, shift weight, or walk short distances to fill portions. Serving customers in a restaurant requires much more walking than standing, and walking longer distances. Consequently, this job demands more than what his physical limitations allow.

7. Oregon Grinders Pizza - Server and Delivery

Employees greet customers, take orders, act as cashier, prepare and serve pizzas, and clean the tables. Some employees deliver pizzas upon proving they have a driver's license and clean driving record. Excellent customer service is expected. Lifting is less than 10 pounds. Workers are allowed to sit during slow periods. This employer is subject to seasonal demands, hiring heavily in the summer, but anticipates hiring 7-8 employees per year. It last hired one month before the survey and offers full- and part-time positions at wages of $7.05 per hour. EX 69 at 258.

For the same reasons as above, this job is not suitable because the Claimant cannot deliver pizzas without a license and is not able to serve customers in a restaurant setting because

[13] The Employer presented no evidence on where classes to obtain the food handler's card and OLCC card would be held, or how often they are available.

the walking requirements are too great. Moreover, this employer reported a stable workforce, which suggests that this job was not reasonably available.

8. Leona's - Restaurant Server

Employees take orders, serve meals, and act as cashier. This restaurant employs dishwashers who assist with cleaning, but the labor market survey did not list dishwashing as an available position. The food service staff makes change, prepares food and does minimal cooking. Lifting requirements are fewer than 10 pounds, and employees mainly stand and walk but may sit during slow periods. Drug testing is required and this restaurant has a stable workforce, but still anticipates 1-2 new employees and last hired in the spring of 2004. Full- and part-time positions are offered at $7.05 per hour. EX 69 259.

The Claimant tested positive for using THC. For this reason alone, this position is not reasonably available to him because this employer conducts drug tests. The server position is also beyond his physical limitations, similar to the other two restaurants above. E.M. testified that when she worked at Leona's as a dishwasher and prep cook, the servers were on their feet for 7 ½ out of 8 hours a day, which I accept as credible given her opportunity to directly observe the servers, and the nature of those jobs. TR at 59. The Claimant cannot walk and stand that long.

9. Affiliated Computer Systems (ACS) – Customer Service Representative

This is a customer-oriented call center where employees respond to routine inquiries about Sprint telephone handsets by following scripts and procedures. The employee gathers information from the caller, communicates options, investigates and resolves complaints, and refers non-routine inquires and complaints to more senior representatives. The employee uses a computer system to log customer calls and to research inquires. No prior experience is necessary. Physical requirements are listed as sitting 6.7 hours, standing 1.3 hours, and no walking (except to a manager's office or training meeting), occasional lifting up to 10 pounds, and occasional bending. The employee may sit, stand, or make postural changes at his discretion at a workstation. Full- and part-time work is available. EX 74 at 312-14.

Dr. Bert approved this position if the Claimant were allowed to change his position on an hourly basis. Although the job description gives lip-service to an employee's freedom to make postural changes, in practice employees are generally immobile. Mr. Funk's labor survey explained that when standing, the employee must remain in an upright position without moving about, and that most employees choose to sit because it is more conducive to data entry. EX 74 at 316. It is not reasonable to expect an employee to do most of his data entry into a computer while standing, unless he has a modified desk that can be raised up and down as his needs to stand and sit change. There is no evidence that this employer is prepared to make work station accommodations of this sort. The Claimant is therefore incapable of doing this work because of the physical requirements, but there are additional factors that deny him reasonable access to this job.

Mr. Stipe's inquiry into this job revealed that this employer is looking for more than mere "bodies" to fill positions. After speaking with a recruiter, he found that this employer requires customer service skills, finesse, understanding of billing practices and procedures, and the ability to type 25 words-per-minute. TR2 106-7. This recruiter also indicated that the company has very high employee turnover because of stress, and that future recruits will be screened for their ability to handle stress and provide customer service. TR2 108. It is unclear whether the Claimant could deal with the stress of this job, but more objective barriers are that he has no keyboarding or computer experience and no driver's license. This employer is located roughly 25 miles from his home, in a rural area that lacks public transit.

The Employer insists that ACS is within reasonable driving distance and should be considered suitable alternative employment because the Claimant could change his driving status.[14] Although there is no authority directly on point, precedent suggests that the Claimant's reticence to regain his driving privileges does not excuse him from employment within reasonable driving distance. *See Livingston v. Jacksonville Shipyards, Inc.*, 32 BRBS 123 (1998) (finding jobs within driving distance suitable where a claimant's authority to drive could, and did change, just after employer located the jobs). *C.f. Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122 (CRT) (9th Cir. 1988) (holding that a claimant's criminal record, in existence at the time of the work injury, can prevent a bank guard position from being "realistically available" because he could do nothing to overcome the disqualifying effect of his criminal record). The Claimant does not have a criminal record; his license was suspended because of traffic violations. He could, therefore, overcome the disqualifying effect of a suspended license, but he considers the $1,600 to more than $2,000 in fines prohibitive.

Mr. Funk testified that if the Claimant were to petition the traffic court for a reduction in his fines, a payment schedule, or for a qualified or limited license allowing him to drive to and from work, then it is likely that court will be lenient because a license improves his chances of finding work, thereby giving him the opportunity to pay his fines. TR2 48. While this appears logical, it is speculative. Holding the Claimant responsible to pursue employment outside of Reedsport depends on the assumption that a court would be lenient. Insofar as Mr. Funk outlined a reasonable procedure for seeking to regain driving privileges, I considered his testimony as evidence of the Claimant's lack of diligence and motivation to return to work. It is not proof of the ability to regain a driver's license.

CONCLUSIONS OF LAW

The Act is construed liberally in favor of injured employees. *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *J.B. Vizzolo, Inc. v. Britton*, 377 F.2d 144 (D.C. Cir. 1967). A judge may evaluate credibility, weigh the evidence, draw inferences, and need not accept the opinion of any

[14] The Employer also suggests that the Claimant could carpool to work or have his wife drive him. Carpooling is too speculative, especially in light of the high turn-over at ACS. The Claimant's wife would have to drive 100 miles a day (one roundtrip to drop the Claimant off, another to pick him up), which would be unrealistically expensive given the wages the Claimant would earn. Moreover, it is not the Employer's place to draft the Claimant's wife into daily, unpaid work as a chauffeur. Thus, both of these options are unreasonable.

particular medical or other expert witness. *Atlantic Marine, Inc. & Artford Accident & Indem. Co. v. Bruce*, 661 F.2d 898, 900 (5th Cir. 1981).

Nature and Extent of Injury

The claimant has the initial burden to establish the nature and extent of his disability. *Trask v. Lockheed Shipbuilding and Construction Co.,* 17 BRBS 56, 59 (1985). A disability is temporary until the claimant reaches MMI, as established by medical evidence. *Id. See also Stevens v. Director, O.W.C.P.*, 909 F.2d 1256, 1260-61 (9th Cir. 1990) (finding that change in status of disability is not retroactive to date of maximum medical improvement). Dr. Bert reported that the Claimant reached MMI on January 27, 2003. CX 31. The Employer asserts that he reached MMI on February 20, 2004, based on an injured worker status report signed by Audrey Duke, F.N.P. EX 39. The chart note that accompanies this report, however, makes no mention of a change in the Claimant's condition; it discusses a change in his pain medication. CX 42 at 62. Without any evidence that the Claimant's condition became better or worse after Dr. Bert determined that he had reached MMI, I accept the January 27, 2003 date for it. The issue remains whether the Claimant is entitled to permanent and total disability from that date forward, or until December 10, 2004, the date of Mr. Funk's vocational report that identified alternative work. *See* EX 61-69.

Total disability is the complete incapacity to earn pre-injury wages in the same work that was done at the time of injury, or in any other employment. To establish a *prima facie* case of total disability, the claimant must show that he is unable to perform his usual employment due to his work-related injury. *See Elliott v. C & P Telephone Co*., 16 BRBS 89 (Jan. 20, 1984). The parties agree that the Claimant cannot return to his job as a laborer, and that he had a temporary, total disability from the date of injury, May 16, 2001, until he reached MMI. On January 27, 2003, the Claimant's disability became permanent. The burden, therefore, shifts to the Employer to show that suitable alternative employment is available. *Hairston v. Todd Shipyards Corp*., 849 F.2d 1194, 1196 (9th Cir. 1988).

Suitable Alternative Employment

Suitable alternative employment encompasses specific jobs that are "realistically available to the employee." *Bumble Bee Seafoods v. Director, O.W.C.P.*, 909 F.2d 1256 (9th Cir. 1990); *Stevens*, 909 F.2d at 1257. Short-term or seasonal work will not suffice. *See Edwards v. Director, O.W.C.P.,* 999 F.2d 1374, 1375 (9th Cir. 1993) (adopting the view that earnings in post-injury employment must be sufficiently regular to determine earning capacity). *Cf., Todd Shipyards Corp. v. Allan*, 666 F.2d 399, 402 (9th Cir. 1982) (explaining that the shipbuilding industry can be cyclical, rendering it difficult to accurately determine whether an employee's post-injury earnings demonstrate his true wage-earning capacity).

The type of work realistically available to the Claimant also depends, in significant part, on his physical limitations. Dr. Bert's written reports muddle time limitations on the Claimant's ability to stand, walk, and sit during the day. The Claimant's physical capacity is clarified, however, by Dr. Bert's deposition testimony, his opinion of Mr. Funk's report, and PRA's evaluation. Dr. Bert believes that the Claimant can stand and walk during an eight-hour day

"somewhere between four and six hours" so long as the Claimant is allowed breaks. He could walk more than four to six hours in a shift if he "can sit up to thirty minutes at a time, interspersed between his walking and standing time;" in that case the Claimant would be able to accomplish a combination of standing and walking "closer to eight" hours. CX 59 at 161-63. When asked whether the Claimant could do a full shift of light to medium work, Dr. Bert agreed that he could, if given the usual breaks in the morning, lunch, and afternoon. CX 59 at 186.

He "concur[red] in the entirety" with Mr. Funk's vocational evaluation that described full-time jobs as suitable for the Claimant. EX 57; CX 59 at 164. For the reasons given above, however, I believe just one of those jobs actually meets the criteria Dr. Burt articulated. He also opined that the PRA evaluation, which concluded that the Claimant was capable of an 8-hour work day, was more reliable than the Bay Area Hospital report because the PRA therapists had more time to observe him. CX 59 at 185. He disagreed, however, with PRA's projection that the Claimant could perform medium work, because those lifting requirements are too great. [15] CX 59 at 193. Taken as a whole, Dr. Bert's testimony and opinions establish that the Claimant is capable of light duty, full-time work that includes, among other things, occasional bending and lifting up to 20 pounds.

The Claimant's technical and verbal skills, and the likelihood given his age, education, and background that he would be hired if he diligently sought the work are also factors that are considered. *Hairston*, 849 F.2d at 1196; *see also New Orleans (Gulfwide) Stevedores v. Turner,* 661 F.2d 1031, 1042-43 (5th Cir. 1981). To demonstrate that suitable alternative employment is available, an employer must identify appropriate *jobs*, not merely one job. The Board and the United States Court of Appeals, Fourth Circuit, have both held a single job opening is not sufficient to satisfy the employer's burden of suitable alternate employment. The employer must present evidence that a range of jobs exists. *Lentz v. Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT) (4th Cir. 1988); *Vonthronsohnhaus v. Ingalls Shipbuilding, Inc*., 24 BRBS 154 (1990). *But see P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116, 121-22 (CRT) (5th Cir. 1991) (finding that identification of a single job opening may be sufficient under appropriate circumstances, where the employee is highly skilled, the job found by the employer is specialized, and only a small number of workers in the local community possess suitable qualifications). The Claimant does not fall within the *P & M Crane* situation. He is not a highly skilled worker competing for a small number of specialized jobs.

Once the employer identifies appropriate jobs, a claimant may show his entitlement to total disability benefits by proving that he has made a diligent but unsuccessful job search and that he is willing to work. *Williams v. Halter Marine Service, Inc.,* 19 BRBS 248, 253 (1987). If the employee does not prove this, then at most his disability is partial, not total. *See Southern v. Farmers Export Co*., 17 BRBS 64 (1985). A judge can find no disability at all if the wages paid for the suitable alternative employment are the same as, or greater than, the claimant's pre-injury wages (adjusted for inflation since the injury). *See* 33 U.S.C.A. § 908(h) (West 2006); *Swain v. Bath Iron Works Corp*., 17 BRBS 145, 147 (1985).

[15] Dr. Bert agreed with Mr. Funk's assessment, which relied on PRA's conclusion that the Claimant was capable of lifting up to 25 pounds. EX 57; TR at 18. Since no job determination called for lifting 25 pounds (all demanded less than 20 or more than 40), it is unnecessary to determine whether Dr. Bert agreed that the Claimant could handle 25 pounds occasionally. It is clear that he thought 30-40 pounds would be too much. CX 59 at 193.

The evidence shows that full-time work is not readily available in Reedsport. Although the Employer need not prove that jobs are plentiful or easily available, it is required to show that there is a range of reasonably obtainable jobs, given the Claimant's diligent effort to pursue them. All but one of the positions the labor marker survey identified were unsuitable for the Claimant. The absence of a range of jobs in or around Reedsport that the Claimant could do with his disabilities is dispositive.

I am troubled by the Claimant's failure to search diligently for employment, and understand why the Employer believed he had not been diligent in seeking work. Diligence, within the context total disability claims, requires a reasonably conscientious attempt to find work "within the compass of employment opportunities shown by the employer to be reasonably attainable and available." *Gulfwide,* 661 F.2d at 1043; *Fortier v. Electric Boat Corporation*, 38 BRBS 75, 78 (2004).

The Claimant has applied for just one job: the water treatment position identified by Mr. McGowan. When asked whether he sought any other work, he answered, "I didn't feel that I was capable enough to do any other jobs around Reedsport with my limitations. . . . [S]o I say why even try and apply for that job when there's somebody out there that can do it?" TR at 81-2. He presented lay testimony of his family members to support his sense that he could not find work even if he had tried. The qualifications and physical capacities of his family members, however, are not relevant to whether any job was available to him. There is no way to tell whether S.G. or E.M. sought work specific to their skills, or whether they were difficult to please as potential employees. The length of time it took them to find jobs they accepted does not excuse the Claimant's failure to seek work.

The Claimant's attitude toward rehabilitation underscores his lack of diligence. As early as 2001, Dr. Bernstein's examination revealed inconsistencies in the Claimant's complaints. In 2002, Dr. Bert's assistant, Mr. Wells, reported that the Claimant just wanted his prescription pain medicines and to remain off work. On June 18, 2003, Mr. McGowan sent job contact forms to the Claimant and asked him to document his search and return the forms to him. The Claimant never returned the forms. CX 61 at 229. Ms. Dodge's observations indicate that the Claimant's subjective complaints of pain were inconsistent. EX 77, CX 62. Dr. Tatyrek commented on the Claimant's passive approach to rehabilitation and recovery. The Claimant had at least the potential to re-establish his driving privileges to seek work outside of Reedsport. He has taken no steps whatsoever to contact the court to reduce his fines or to obtain a provisional license that would at least permit him to drive to work to earn the money to pay the fines.

Regardless of the Claimant's failure to seek employment diligently, the Diary Queen job alone is not enough to rebut his claim for total disability. Therefore, he is entitled to permanent and total disability benefits as of the date of MMI.

Interest

The Claimant is entitled to interest on any accrued, unpaid compensation benefits. *Watkins v. Newport News Shipbuilding & Dry Dock Co*., 8 BRBS 556, 559 (1978), *aff'd in part,*

rev'd in part sub nom., Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). Interest is mandatory and cannot be waived in contested cases. *Canty v. S.E.L. Maduro,* 26 BRBS 147 (1992); *Byrum v. Newport News Shipbuilding & Dry Dock Co*., 14 BRBS 833 (1982); *MacDonald v. Sun Shipbuilding & Dry Dock Co.,* 10 BRBS 734 (1978). Accordingly, interest on any gaps in compensation resulting from the Employer's termination of voluntary payment of temporary total disability benefits, and on unpaid permanent total disability benefits is to be included when the District Director calculates the amounts due.

Attorney's Fees

A claimant's attorney may be awarded a fee from the employer for a "successful prosecution" of a claim for benefits. 33 U.S.C.A § 928 (West, 2006); 20 C.F.R. § 702.134(a); *Perkins v. Marine Terminals Corp*., 673 F.2d 1097 (9th Cir. 1982). The Employer's termination of voluntary temporary total disability benefit payments on January 17, 2003, required the Claimant to seek the assistance of counsel. Claimant's counsel has procured the Claimant's temporary total disability benefits from May 16, 2001 to January 26, 2003; and permanent total disability benefits from January 27, 2003 to the present and continuing. He is entitled to fees for this successful prosecution.

Claimant's counsel shall file a petition for attorney's fees and costs within 30 days from the date the District Director serves this order. *See* 20 C.F.R. § 702.132. A service sheet showing that service has been made upon all the parties, including the Claimant, must accompany this petition. The Employer shall file its objections within 15 days following the service of the fee petition. The parties shall meet in person to discuss and attempt to resolve any objections within 15 days after objections are served. Claimant's counsel shall file a report within 15 days thereafter stating which objections have been resolved, which have been narrowed, and which remain unresolved.

ORDER

Based on the foregoing, the following are ordered:

1. The Employer is liable for any unpaid temporary total disability benefits from May 16, 2001, until it terminated them, based on an average weekly wage of $227.10.

2. The Employer is liable for any unpaid permanent total disability benefits from January 27, 2003 to the present and ongoing, based on an average weekly wage of $227.10.

3. The Claimant is entitled to annual increases in the permanent total disability benefits payable. 33 U.S.C.A. § 906(b)(3) (West 2006).

4. The Employer is liable for interest on any accrued, unpaid compensation benefits at the statutory rate described in 28 U.S.C.A. § 1961 (West 2006).

5. Claimant's counsel is entitled to reasonable attorney's fees and costs for benefits procured on the Claimant's behalf.

6. The specific dollar computations may be administratively calculated by the District Director.

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William Dorsey
Administrative Law Judge